NO. 83-2137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL REALTY CORPORATION,

Petitioner,

v.

HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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QUESTIONS PRESENTED

I. Whether the United States Supreme Court has jurisdiction to review the Petition for Writ of Certiorari,

A. Where Petitioner did not raise the federal question in either of his petitions to the state courts below; and

B. Where the judgment sought to be reviewed is not "final" within the meaning of 28 U.S.C. Section 1257.

II. Whether the United States Supreme Court should grant discretionary review where Petitioner's Petition for Writ of Certiorari does not present a "special and important reason" in that neither the North Carolina Court of Appeals nor the North Carolina Supreme Court decided an important federal question and further in that, even if the question raised by Petitioner's Petition were an important federal question, the decision of the North Carolina Court of Appeals appealed from is not in conflict with decisions of the Supreme Court, a federal court of appeals or another state court.

III. Whether the North Carolina Court of Appeals deprived the Petitioner of its right to an opportunity to be heard, as guaranteed by the due process clause of the fourteenth amendment of the United States Constitution, when it remanded Petitioner's action to the trial court for further proceedings on the existing record instead of ordering a new trial.

IV. Whether the decision of the North Carolina Court of Appeals appealed from is in conflict with either the statutory or the case law of the State of North Carolina.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

OPINIONS BELOW

Respondent accepts and incorporates by reference the opinions cited by Petitioner in the Petition for Writ of Certiorari.

JURISDICTIONAL GROUNDS

The judgment of the North Carolina Court of Appeals on December 6, 1983, reversing and remanding the action to the trial court for further proceedings on the existing record, is interlocutory in nature and not a final judgment for purposes of 28 U.S.C. Section 1257. In addition, Petitioner made no mention of the constitutional question of its right to an opportunity for a full hearing, as guaranteed by the due process clause of the fourteenth amendment to the United States Constitution, in either its petition to the North Carolina Court of

Appeals for a rehearing or in its petition to the North Carolina Supreme Court for discretionary review but instead has raised the issue for the first time in its Petition for Writ of Certiorari. For these reasons, this Court is without jurisdiction to review the judgment herein by writ of certiorari.

STATUTES INVOLVED

Respondent accepts and incorporates by reference the statutes cited by Petitioner in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner filed this action in the Buncombe County Superior Court on December 20, 1976, seeking to recover money damages for, inter alia, Home Federal's alleged breach of its permanent loan commitment to Landmark Hotel, Inc., former owner of the Landmark Hotel (now Inn on the

Plaza) in Asheville, North Carolina. Respondent answered, denying that Petitioner was a third party beneficiary of said permanent loan commitment and that there was no privity of contract between Petitioner and Respondent and alleging that, even if there were a contractual relationship between them, neither Petitioner nor Landmark Hotel, Inc. (the borrower) had satisfied the conditions precedent to Respondent's obligation to fund under its permanent loan commitment.

Two weeks before the trial began both parties filed motions for summary judgment based on affidavits and extensive depositions, filed extensive briefs in support of their motions and presented oral arguments for two days before the Honorable C. Walter Allen, Judge Presiding for the Buncombe County Superior Court.

Although Judge Allen denied both parties' motions, the hearing on these motions served to frame the issues and provide an outline of each party's position in the controversy.

The actual hearing of this case commenced on September 22, 1980, and lasted fourteen trial days through October 9, 1980. On the opening day of the trial of this case, Judge Allen entered a Pretrial Order. In that Order, Petitioner and Respondent consented to the admissibility, if relevant, of 150 exhibits, which Petitioner proposed to introduce, and of 214 exhibits, which Respondent proposed to introduce. Fifty-five statements of fact were stipulated to by the parties. Each party submitted a trial brief. Judge Allen heard testimony from thirty witnesses,

heard depositions of six witnesses read into evidence and admitted into evidence 170 documentary exhibits offered by Petitioner amd 224 documentary exhibits offered by Respondent. The trial transcript consists of 14 volumes containing more than 1800 pages exclusive of deposition testimony.

At the conclusion of all the evidence, Judge Allen requested that the parties prepare proposed judgments containing findings of fact and conclusions of law.

Judge Allen subsequently deferred the date when the proposed judgments were due until after the trial transcript had been prepared so that the proposed judgments could be cross-referenced to the trial transcript.

Respondent submitted a proposed judgment containing 27 conclusions of law

supported by 84 findings of fact. Each of the findings of fact in Respondent's proposed judgment was cross-referenced to the stipulations of fact of the Pretrial Order, documentary exhibits and witnesses' testimony on which it was based. In almost every instance, Respondent's findings of fact were supported by the testimony of both Petitioner's witnesses and witnesses not employed by Respondent. In addition, internal memoranda prepared by Petitioner's employees substantiated many of Respondent's proposed findings of fact.

On November 23, 1981, Judge Allen heard final arguments in the case, after receiving the parties' proposed judgments. Once again, the parties submitted extensive briefs.

Judge Allen considered the briefs, the evidence, the proposed judgments and the parties' closing arguments and on June 29, 1982, entered judgment in favor of Respondent. By the time judgment was entered, Judge Allen had read at least three briefs submitted by each party in support of its position, had heard the arguments of each party on its summary judgment motion, had been exposed to the stipulated facts, had heard the trial evidence for fourteen days, had read each party's proposed judgment, had had access to the complete trial transcript, and had heard final arguments by the parties' attorneys. The judgment was prepared and filed by Judge Allen without the benefit or guidance of Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983), which was not

filed by the Supreme Court until January 11, 1983.

Petitioner gave notice of appeal on July 7, 1982. On December 3, 1982, the Record of Appeal in this case was docketed with the North Carolina Court of Appeals.

On December 6, 1983, the North Carolina Court of Appeals filed its decision in this matter, and the case was certified to Buncombe County on December 27, 1983. The Court's decision reversed the judgment of the trial court and remanded the case to the trial court on the existing record "for further proceedings consistent with this opinion" on the ground that the trial court had failed to address certain legal issues before it and make conclusions of law and findings of fact thereon as required by Farmers

Bank v. Michael T. Brown Distributors, Inc., id.

On January 11, 1984, Petitioner filed a petition under Appellate Rule 31(a) for rehearing of the judgment of the Court of Appeals, seeking to obtain a new trial. In its petition for rehearing, Petitioner argued only that the failure to grant a new trial was contrary to North Carolina case law. Nowhere in the petition for rehearing did Petitioner raise, argue or mention, either expressly or by implication, that failure to grant a new trial would deny Petitioner its fourteenth amendment due process rights. (See Appendix pp. 1-16.)

By order entered February 7, 1984, the North Carolina Court of Appeals denied Petitioner's petition for rehearing and certified the order to the Clerk

of Superior Court in Buncombe County, North Carolina.

On February 22, 1984, Petitioner filed a petition with the North Carolina Supreme Court for discretionary review under N.C. Gen. Stat. Section 7A-31, and Rule 15 of the North Carolina Rules of Appellate Procedure. In its petition for discretionary review, Petitioner argued only that the decision of the Court of Appeals remanding the case on the existing record without ordering a new trial was contrary to North Carolina law. Again, nowhere in the petition for discretionary review did Petitioner raise, argue, or mention, expressly or by implication, that failure to grant a new trial would deny Petitioner its fourteenth amendment due process rights. (See Appendix pp. 17-36.)

On April 3, 1984, the North Carolina Supreme Court entered an Order denying Petitioner's petition for discretionary review. That Order was certified to the North Carolina Court of Appeals by the Clerk of the Supreme Court of North Carolina on April 5, 1984, and on April 9, 1984 the Clerk of the North Carolina Court of Appeals certified the denial of the petition for discretionary review to the Clerk of Superior Court of Buncombe County.

Respondent is informed that Petitioner filed with the Supreme Court of the United States its Petition for Writ of Certiorari on June 28, 1984, and its Notice of Appearance on July 13, 1984.

REASONS FOR DENYING THE WRIT

I. The United States Supreme Court is without jurisdiction to review the Petition for Writ of Certiorari

A. Where Petitioner has failed to raise the federal question in the state courts below

Petitioner is attempting to assert a federal constitutional issue which it did not raise in either its petition for rehearing or its petition for discretionary review and which was not ruled upon in the state courts below. (Appendix pp. 1-36.)

In Petitioner's Statement of the Case, it refers to the petition to the North Carolina Court of Appeals for rehearing in which ". . . Chemical argued that the failure of the court of appeals to order a new trial was contrary to North Carolina law . . . and by implication, that the failure of the Court of

Appeals to order a new trial was a denial of Chemical's due process rights." (Emphasis added.) (Petition for Writ of Certiorari pp. 10-11.) Petitioner further states in its Statement of the Case with respect to its petition to the North Carolina Supreme Court for discretionary review that the ruling was ". . . contrary to North Carolina law and by implication, the United States Constitution." (Emphasis added.) (Petition for Writ of Certiorari p. 12.)

Not once in either the petition for rehearing (Appendix pp. 1-16) or in the petition for discretionary review (Appendix pp. 17-36) did Petitioner raise or even mention that its rights as guaranteed by the due process clause of the fourteenth amendment had been violated. Nor was the issue raised or mentioned in

the opinion of the North Carolina Court of Appeals or in the orders of the North Carolina Court of Appeals denying the petition for rehearing and of the North Carolina Supreme Court denying the petition for discretionary review. The contention that Petitioner raised the constitutional issue in the state courts "by implication" should, on its face, be grounds for dismissal.

The Supreme Court of the United States has consistently held that it ". . . will not decide federal constitutional issues raised here for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 438 (1968).

In Tacon v. Arizona, 410 U.S. 351, 352 (1973), this Court stated, in dismissing the writ of certiorari as

improvidently granted, that "it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here." The cases are consistent with its decision in Honeyman v. Hanan, 300 U.S. 14, 18-19 (1937), that it ". . . must appear affirmatively from the record, not only that the federal question was presented to the highest court of this state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause." (Emphasis added.) Accord Raley v. Ohio, 360 U.S. 423 (1959); Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182 (1944).

More recently, this Court has reiterated this question, in holding that

it was without jurisdiction to grant certiorari, where the Georgia Supreme Court had failed to rule on the federal issue raised by the petitioner there, as follows:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb v. Webb, 451 U.S. 493, 502 (1981).

It does not appear affirmatively from the record nor does the Petition for Writ of Certiorari show that there was an explicit and timely insistence

by Petitioner in the state courts that it was denied its right of due process as guaranteed by the fourteenth amendment to the United States Constitution. In the Statement of the Case, Petitioner contends only that the issue was raised in the state courts "by implication". (Petition for Writ of Certiorari pp. 10-11 & 12.) This does not conform to Rule 21(h) of the Supreme Court Rules or prior rulings by this Court. Petitioner's Writ of Certiorari should be denied.

In deciding whether the question was "specially set up or claimed" within the meaning of §1257, "it is relevant and usually sufficient to ask whether the petitioners satisfied the state rules governing presentation of

issues." Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 334 (1968).

Rule 31(a) of the North Carolina Rules of Appellate Procedure, governing the petition for rehearing, states that "the petition shall state with particularity the points of fact or law which, in the opinion of the petitioner, the court has overlooked or misapprehended . . . ." (Emphasis added.) Rule 15(c) of the North Carolina Rules of Appellate Procedure, governing the petition for discretionary review, states: "The petition shall . . . set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under G.S. §7A-31 for discretionary review." (Emphasis added.)

If the Petitioner had desired to raise the federal question in the state courts, it would have been required to state said question with particularity in the petition for rehearing or set it forth plainly and concisely in the petition for discretionary review. It did neither. (Appendix pp. 1-16 and 17-36.) Thus, this Court lacks jurisdiction to consider the Petition for Writ of Certiorari.

B. Where the judgment sought to be reviewed is not final as required by 28 U.S.C. §1257

Neither the judgment of the North Carolina Court of Appeals nor the order denying discretionary review is "final" within the meaning of §1257. The North Carolina Court of Appeals has reversed and remanded the case to the trial

court for further proceedings consistent with its decision. It has not addressed or ruled upon the conclusions of law and findings of fact made by the trial court in its judgment pending the trial court's decision on certain issues which the Court of Appeals determined that the trial court had not adequately addressed and should address. Therefore, the judgment is not final.

The state court judgment must be

> [f]inal . . . in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.

Market Street Ry Co. v. Railroad Comm'n, 324 U.S. 548, 551 (1945).

In Collins v. Miller, 252 U.S. 364, 370 (1920), the Court stated that

the judgment, to be appealable, "should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved."

In determining the finality of a state court judgment, local law is a material, though not a decisive, factor. Gospel Army v. Los Angeles, 331 U.S. 543 (1947).

In Tridyn Indus.,Inc. v. American Mut. Ins. Co., 296 N.C. 486, 488, 251 S.E.2d 443, 444 (1979), the North Carolina Supreme Court stated:

> A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . an interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle

> and determine the entire controversy.

An interlocutory or intermediate determination, such as the decision of the North Carolina Court of Appeals, is not a final judgment for purposes of review by the Supreme Court. Market Street Ry Co. v. Railroad Comm'n, supra. A judgment or decree of a state appellate court, reversing an inferior court and remanding the case to the lower court for further judicial proceedings, is not a final judgment and cannot be reviewed by the United States Supreme Court. Prudential Ins. Co. v. Cheek, 252 U.S. 567 (1920); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915).

For these reasons, this Court is without jurisdiction to review the judgment of the North Carolina Court of Appeals. The judgment is not final, and

the federal question was not raised in the state courts below and may not be the basis for a petition for writ of certiorari now.

II. The Supreme Court should not exercise its discretion to grant certiorari where the Petition for Writ of Certiorari does not allege a "special and important" reason for review

Even if Petitioner had raised the federal question in state court and had petitioned from a final judgment, the Petition for Writ of Certiorari does not state any "special and important reasons" for reviewing the decision of the North Carolina Court of Appeals as required by Rule 17 of the Supreme Court Rules. The constitutional issue is not one of general importance, and the state court has not decided the question in conflict with other deci-

sions of this Court, a federal court of appeals or another state court. The refusal to grant a new trial will not violate the Petitioner's due process rights. See Swenson v. Skidham, 409 U.S. 224 (1972); Ford Motor Co. v. N.L.R.B., 305 U.S. 64 (1938).

As this Court stated in Rice v. Sioux City Memorial Park Cemetary, Inc., 349 U.S. 70, 74 (1955):

> 'Special and important reasons' imply or reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard to the court's duty to avoid decision of constitutional issues unless avoidance becomes evasion.

In this case, the issues involved do not reach constitutional dimensions. Even if they did, this Court has a duty to avoid decision on the issues unless

there is a question of importance not heretofor decided.

The Petitioner does not allege that the decision of the North Carolina Court of Appeals is in conflict with any federal decision on the constitutional issue it raises for the first time in its Petition. The decision has no importance to any past or future decision of this Court or others. Petitioner only argues that the decision of the North Carolina Court of Appeals is in conflict with a recent North Carolina Supreme Court case, Farmer's Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

But apparently the state court of last resort, the North Carolina Supreme Court, felt there was no conflict and therefore denied discretionary review.

There was substantial evidence in the record to support the additional findings of fact and conclusions of law which the trial judge must make under the decision of the North Carolina Court of Appeals. The refusal to grant the new trial would not, in any way, deprive the Petitioner of an opportunity to be heard.

Petitioner cites Brinkerhoff-Faris Trust Sav. Co. v. Hill, 281 U.S. 673 (1930), in support of its contention that, by remanding for further proceedings without ordering a new trial, the North Carolina Court of Appeals has deprived Petitioner of its due process rights. Brinkerhoff-Faris Trust & Sav. v. Hill, id., is easily distinguished from the instant case. First, the plaintiff there explicitly and timely raised the constitutional issue in the petition

for rehearing before the Missouri Supreme Court, establishing thereby the Court's jurisdiction to review it on certiorari. Secondly, this Court held that the plaintiff had been deprived of due process because the state court refused to hear plaintiff's complaint when plaintiff did not first seek an administrative remedy. Here, the trial court heard the Petitioner's complaint, evidence and arguments at trial. Petitioner will have further opportunity to be heard on remand to the trial court.

In addition, certiorari in this case should be denied for other, practical reasons. If certiorari were granted, it would mean that any party could petition this Court for certiorari by alleging that it had raised the constitutional issue of due process deprivation by

implication or that said issue had been ruled upon by implication. Secondly, a party could petition this Court if his case were remanded for further proceedings without a new trial by claiming he was deprived of an opportunity to be heard without regard to whether he had had a full and fair hearing in the first instance.

III. The North Carolina Court of Appeals has not deprived Petitioner of its right to be heard, as guaranteed by the due process clause of the fourteenth amendment to the United States Constitution, when it remanded Petitioner's action to the trial court for further proceedings on the existing record instead of ordering a new trial

The Supreme Court of the United States has held that the due process requirement of an opportunity to be heard is satisfied when that opportunity is at a meaningful time and in a

meaningful manner. Mathews v. Eldridge, 424 U.S. 319 (1976). The right to that opportunity must, however, be kept within the limits of practicality. Boddie v. Connecticut, 401 U.S. 371 (1971).

In Mathews v. Eldridge, supra, the Court set out three major factors for determining whether a party received an adequate hearing. Those factors are the private interests of the parties, the government's interest, including practicality considerations, and the risk of erroneous deprivation of such interest through procedures used and the probable value of additional procedural safeguards.

The Petitioner contends that the Court of Appeals ruling, remanding the cause for further proceedings upon the

existing record, denied its opportunity to be heard by depriving it of a "full hearing". The Supreme Court has defined a full hearing as one in which ample opportunity is afforded to all parties to make by evidence and argument of a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. Akron C&Y Ry. Co. v. United States, 261 U.S. 184 (1923).

Petitioner has not, however, asserted how those rights have been deprived by the action of the North Carolina Court of Appeals. The judgment of the trial court was vacated because two necessary issues were not included in the findings and conclusions of the court. The Court of

Appeals found no questions raised on appeal as to the admission or exclusion of evidence or the credibility of witnesses. Both issues which were lacking in the findings and conclusions of the court, the alleged contractual relationship between the Petitioner and the Respondent and the third party beneficiary status of Petitioner in respect to Respondent's permanent loan commitment, were raised by the Petitioners in its original complaint. Therefore, at the original trial it had a full opportunity to present evidence and arguments as to these issues and did so. There is no contention by Petitioner that there is new evidence which has surfaced since the trial nor is there a contention that relevant evidence as to these matters was

excluded at the trial. Hence, it must be assumed that the existing record is adequate to support the additional conclusions of law in question.

There is no limitation preventing the Petitioner from making further arguments to the trial judge with respect to the issues remanded. The Petitioner had a reasonable opportunity to be heard as to the resolved issues from which no appeal was taken. Further, the Petitioner had ample opportunity to present at the trial evidence and arguments as to the issues on which the trial judge failed to rule and has additional opportunity for input on these.

Once the trial court has made specific findings as to the remanded issues, the Petitioner still has an

opportunity to challenge those rulings, and, if the Petitioner disagrees with the decision of the trial court on remand, it can appeal to the North Carolina Court of Appeals on the entire record and ask it to determine whether those issues were fairly resolved and whether the judgment was supported by adequate findings and conclusions.

The constitutional issue which Petitioner attempts to raise in its Petition is analogous to the criminal trial proceeding where a challenged confession is admitted to the jury before there has been a judicial finding of voluntariness with respect to that confession and a verdict is rendered against the defendant. This Court has held that a flaw in the trial proceeding of such nature does not

entitle the accused to a new trial, if subsequently the state provides the accused with an error free judicial determination of voluntariness. Swenson v. Stidham, 409 U.S. 224 (1972); See also Jackson v. Denno, 378 U.S. 368 (1964). Respondent respectfully submits that, if a new trial is not required in a criminal proceeding to protect the accused's due process rights, remand of this case to the trial court for further proceedings consistent with the Court of Appeals' decision would not violate the Petitioner's due process rights, where it has had and will have an opportunity to be heard.

Respondent's contentions in this regard are consistent with the holding of this Court that, on remand from an appeal from an administrative proceeding, where the appellate court deter-

mines that the findings of fact and conclusions of law were inadequate, if the findings which are lacking may be made properly upon the evidence already received, it is not required that evidence be reheard. Ford Motor Co. v. N.L.R.B., 305 U.S. 364 (1938).

IV. The decision of the North Carolina Court of Appeals is not in conflict with either the statutory or the case law of the State of North Carolina

Petitioner contends that the decision of the North Carolina Court of Appeals conflicts with the decision of the North Carolina Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., supra. An examination of Farmers Bank will show that there is no conflict.

First, in both Farmers Bank and in Quick v. Quick, 305 N.C. 446, 290 S.E.2d 653 (1982), cited by Petitioner, the Court of Appeals had affirmed the trial court's judgment. Here, the Court of Appeals did not affirm the judgment of the trial court, but instead entered an interlocutory determination reversing the trial court's judgment and remanding the cause to the trial court to make conclusions of law and findings of fact on each of the six issues specified in its decision based on the record. Thus, the North Carolina Court of Appeals has done here what the North Carolina Supreme Court did in both cases relied on by Petitioner, i.e. reversed and remanded to the trial

court for further proceedings consistent with its decision.

Secondly, the trial court's judgment in Farmers Bank v. Michael T. Brown Distributors, Inc., supra, contained a conclusion of law which the majority of the Supreme Court felt was not supported by either adequate findings of fact or sufficient evidence on which to base adequate findings of fact. Here, the Court of Appeals in its decision has held that the judgment of the trial court is deficient for failing to address certain issues before it and to make conclusions of law thereon and findings of fact in support thereof. The Court of Appeals has made no determination on the adequacy of the evidence to support such conclusions of law and findings of

fact as the trial court shall make on remand. The Petitioner has not alleged that it has new or additional evidence to introduce.

The only difference in the opinion of the Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., supra, and the decision of the Court of Appeals in the case at bar, if any exists, is the manner in which the trial court was to proceed on remand. In Farmers Bank, a hearing was ordered to take evidence on one of the principal issues of the case. In this case, there is no suggestion that the evidence is insufficient and the cause has been remanded for further proceedings upon the existing record consistent with the Court of Appeals' decision.

A new evidentiary hearing is not mandated in every case which is remanded for additional findings of fact. In Coble v. Coble, 300 N.C. 708, 268 S.E.2d 185 (1980), the North Carolina Supreme Court remanded because the findings of fact were insufficient to support the judgment but did not require a new hearing. Other cases have been remanded for more detailed findings of fact without requiring a new hearing. See Crosby v. Crosby, 272 N.C. 235, 158 S.E.2d 77 (1967); Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967); Evans v. Craddock, 61 N.C.App. 438, 300 S.E.2d 908 (1983).

Chemical also relies upon Quick v. Quick, supra, and Baysdon v. Nationwide Mut. Fire Ins. Co., 259 N.C. 181, 130

S.E.2d 311 (1963), as support for its contention that, if it is not entitled to a new trial, it is entitled to an evidentiary hearing on the six issues specified in the Court of Appeals decision. A rehearing was ordered in both cases because the Supreme Court was of the opinion that some of the facts of the case which were necessary to a determination of the rights and liabilities of the parties had not been fully developed at the trial. There has been no suggestion in this case that there are any facts which remain to be developed.

Chemical also contends that a new trial is needed to avoid tainting the new judgment of the trial court and cites Conrad v. Jones, 31 N.C.App. 75, 228 S.E.2d 618 (1976), in support thereof.

The basis for the Court of Appeals' holding in Conrad is easily distinguished from its decision in this case. There the Court of Appeals held that the judge had tried the case on an incorrect legal theory. The Court said:

> . . . [I]t appears that the trial judge believed that the court had no authority to grant equitable relief unless the plaintiffs offered evidence of irreparable injury. However, plaintiffs' claim is based upon 'continuing trespass' and equitable relief in the form of a permanent injunction is the proper remedy in such cases in order to avoid a multiplicity of actions at law for damages. (Citations omitted)

Id. at 78.

There is no indication that the trial court here either incorrectly framed the issues on which the trial was conducted or misunderstood the rules of law applicable to said issues,

only that the trial court had made insufficient conclusions of law and findings of fact in support thereof with regard to certain specified issues.

O'Grady v. First Union Nat'l Bank, 296 N.C. 212, 250 S.E.2d 587 (1978), cited by Petitioner, is also distinguishable. There, the trial court had improperly excluded plaintiff's parol evidence which was relevant to whether there existed a condition precedent to liability on a guaranty and to what the intentions of the guarantor were at the time the guaranty was executed. The testimony excluded went to the heart of the gravamen, i.e. whether the guaranty on which the action was brought existed.

In this case, Petitioner has also objected to the admission of certain

evidence. The testimony complained of was not offered on the ultimate issue of the existence and legal effect of the documents but to provide details of the contract negotiations and intentions of the parties. Even if the evidence in question were determined to be inadmissible, there is sufficient other admissible evidence to which Petitioner has not objected to support each of Respondent's proposed findings of fact. Because of the interlocutory nature of the Court of Appeals' decision, it did not attempt to make a determination on the admissibility of the evidence in question.

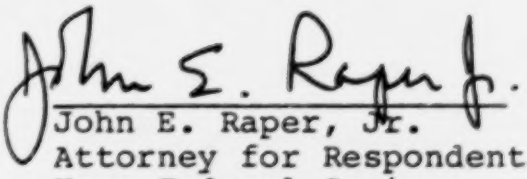
CONCLUSION

The decision of the North Carolina Court of Appeals, from which Petitioner's petitions for rehearing and

for discretionary review have been unanimously denied, is plainly correct. The Petition for Writ of Certiorari is both premature and attempts to raise for the first time a constitutional issue which Respondent did not raise or argue in the state courts.

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted this 30th day of July, 1984.



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Appendix 1

No. Twenty-Eighth District

NORTH CAROLINA COURT OF APPEALS

* * * * * * * * * * * * * * * * * *

CHEMICAL REALTY CORPORATION	)	FROM BUNCOMBE COUNTY
	)	No. 76-CVS-2491
v.	)	
	)	(8228 SC 1265)
HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD	)	

* * * * * * * * * * * * * * * * * *

PLAINTIFF - APPELLANT'S PETITION UNDER APPELLATE RULE 31 FOR REHEARING OF JUDGMENT OF THE COURT OF APPEALS REMANDING THE CASE TO THE TRIAL COURT ON THE EXISTING RECORD RATHER THAN ORDERING A NEW TRIAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Chemical Realty Corporation, plaintiff-appellant, ("Chemical") respectfully petitions this Court for a rehearing of the judgment of this Court entered the 27th day of December, 1983,

remanding the case to the trial court on the existing record, upon the following grounds:

(1) The Court of Appeals erred in failing to order a new trial, and the appellate court decision should be modified accordingly.

(2) In the alternative, Chemical is entitled to a hearing at the trial level at which time evidence may be presented on the six issues which the Court of Appeals has ruled must be determined by the trial court.

I. THE JUDGMENT OF THE TRIAL COURT SHOULD BE VACATED AND A NEW TRIAL ORDERED.

The Court of Appeals has ruled that the case can be remanded to the trial court "on the existing record" without the necessity of a new trial. Slip op. at 13. However that ruling is

contrary to the holding of the North Carolina Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N. C. 342, 298, S. E. 2d 357 (1983).

In Farmers Bank, as in this action, the case was tried without a jury. In both cases the trial courts made certain findings of fact and conclusions of law on some of the issues in the cases but failed to make all the necessary findings arising under the pleadings and the evidence. The Supreme Court in Farmers Bank vacated the order of the trial court and ordered a new "hearing" so that the court could make adequate and appropriate findings of fact and conclusions of law. It is the contention of Chemical that a new "hearing" is synonymous with a new trial since

the trial court's decision in the Farmers Bank case was made as the result of an actual trial.

There are other North Carolina decisions which also support Chemical's argument for a new trial. See O'Grady v. First Union National Bank, 296 N. C. 212, 250 S. E. 2d 587 (1978); Baysdon v. Nationwide Mutual Fire Insurance Co., 259 N. C. 181, 130 S. E. 2d 311 (1963); Conrad v. Jones, 31 N. C. App. 75, 228 S. E. 2d 618 (1976).

The instant case is analogous to the Conrad case in which the plaintiffs sought a mandatory injunction ordering the defendants to disconnect a sewer line constructed by them from an eight inch line allegedly owned by one of the plaintiffs and a permanent injunction restraining the defendants from recon-

necting their sewer line to the plaintiff's sewer line. The action was tried without a jury, and the court made findings of fact and concluded that the plaintiffs were not entitled to equitable relief. On appeal by the plaintiffs, the Court of Appeals reversed the trial court, vacated the judgment and ordered a new trial because the trial court failed to make any findings with respect to what interest, if any, the plaintiffs had in the sewer line, and thus whether they were entitled to equitable relief. 31 N. C. App. at 79. As in Conrad, until the trial court determines the fundamental question of whether a contract exists between Chemical and Home Federal, the court cannot determine the other issues in the case which it has

already determined. Since the new judgment may be tainted by the old judgment, Chemical is entitled to a new trial.

This argument is strengthened further by Chemical's exceptions, assignment of error and arguments made in its appellate brief relating to the erroneous introduction of certain trial testimony. As explained in VI of Chemical's brief filed with the Court on February 1, 1983, the trial court erred by allowing various lay witnesses to testify as to the existence and legal effect of various contracts involved in the lawsuit. However, North Carolina law is clear that "a witness will not be allowed to give his opinion on the very question for the jury to decide" and "a non-expert may

not testify to the legal effect of a transaction or other fact." See H. Brandis, Brandis on North Carolina Evidence, §126 at 393; §130 at 501 (2d Rev. Ed. of Stansbury's North Carolina Evidence); in both The Bonnet-Brown Corporation v. Coble, 195 N. C. 491, 142 S. E. 772 (1928), and Richard v. Wilmington and Weldom Railroad Company, 126 N. C. 100, 35 S. E. 235 (1900), the Supreme Court ordered new trials because the trial court erred in allowing in non-expert opinion testimony.

Similarly, in O'Grady v. First Union National Bank, 296 N. C. 212, 250 S. E. 2d 587 (1978), the court ordered a new trial where the court in a non-jury case erred in making rulings on the admission of certain testimony.

Thus, as in those cases, a new trial should be ordered based on the trial court's erroneous evidentiary rulings.

In addition to the erroneous evidentiary rulings of the trial court, Chemical has also made exceptions and assignments of error relating to errors of law in the findings and conclusions relating to the issue of a first lien on the hotel real property. For example, conclusion of Law Number 4 states in part:

> On October 14, 1974, neither Landmark nor Chemical could deliver a permanent loan Deed of Trust evidencing a valid first lien on the hotel real property to secure a $6,000,000.00 loan evidenced by the first mortgage real estate note.

However, as explained in Chemical's appellate brief in part II-A-2, V-K and V-L-3, that conclusion is based on erroneous legal interpretations of the

court. Although the Court of Appeals did not reach that question, it goes to the heart of the case. In Rock v. Ballou, 286, N.C. 99, 209 S. E. 2d (1974), while the North Carolina Supreme Court refused to order a "complete new trial", in a case where findings of face were inadequate, it did so on the ground that "no error of law is shown in the findings of fact heretofore made." The errors of law in the present case pervade the judgment and should result in a new trial.

II. AT A MINIMUM, CHEMICAL IS ENTITLED TO A NEW HEARING AT WHICH IT MAY INTRODUCE ADDITIONAL EVIDENCE ON THE ISSUES TO BE DECIDED BY THE TRIAL COURT.

If Chemical is not entitled to a new trial on all of the issues in the case, it is clearly entitled to a hearing on the six issues which the

Court of Appeals has stated must be resolved by the trial court. See Slip op. at 12. In Quick v. Quick, 305 N. C. 446, 290 S. E. 2d (1982), the plaintiff sought permanent alimony and attorney's fees. The trial court, after hearing extensive testimony and receiving various documents into evidence, made findings of fact under Rule 52, but the Supreme Court found the court failed to make findings on certain material issues which would support the judgment for the plaintiff in the amount of $1275.00 per month as permanent alimony and $1000.00 in attorney's fees. The court stated:

> [T]here is evidence in the record from which findings of fact could be made to support the amount awarded. There is also ample evidence which would support a lower award. What the evidence does in fact show is a matter for the trial court's determination,

> and its determination should be stated in appropriate and adequate findings of fact.

305 N. C. at 457. The court held:

> For the reasons stated above, the decision of the Court of Appeals is reversed. The order awarding plaintiff permanent alimony and attorney's fees is vacated. A new hearing shall be held in the trial court for determination of permanent alimony and counsel fees, if any, and the trial court shall make appropriate and sufficent findings of fact and conclusions of law to support its new determination. (Emphasis added.)

Id., at 463.

In Rock v. Ballou, 286 N. C. 99, 209 S. E. 2d 476 (1974), a case in which the parties had waived jury trial and the Supreme Court of North Carolina remanded the case to the Superior Court for further findings of fact, the Supreme Court said:

> "The matter must be remanded to the Superior Court solely for findings as to the above mentioned

> questions of fact, which findings the Superior Court may make upon the present record, together with such further evidence as the Superior Court may deem necessary to enable it to make such findings, and thereupon to enter its judgment."

286 N. C. 105. The Superior Court should be given the same authority here.

Obviously, before the trial court in this action can make findings of fact and conclusions of law on the six issues remanded to it, the court must hold a hearing to receive evidence from both parties on those issues. An evidentiary hearing is required even though, as in Quick v. Quick and Rock v. Ballou, there is already evidence in the record on these issues.

CONCLUSION

The opinion of the Court of Appeals should be modified to order a new

trial, or in the alternative, for an evidentiary hearing on the six issues to be decided by the trial court.

This 10th day of January, 1984.

PARKER, POE, THOMPSON,
BERNSTEIN, GAGE &
PRESTON

By: /s/ Sydnor Thompson
Sydnor Thompson

/s/ Sally Nan Barber
Sally Nan Barber

ATTORNEYS FOR
CHEMICAL REALTY
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Appendix 14

HERBERT L. HYDE, ESQ.
47 Market Street
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(704) 258-2991

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Petition upon the defendant by depositing a copy in the United States mail, with adequate postage thereon to insure delivery, addressed to counsel of record, to wit:

Richard M. Wiggins
John E. Raper, Jr.
McCOY, WEAVER, WIGGINS,
CLEVELAND & RAPER
P. O. Box 7179
Fayetteville, North Carolina
28302

John S. Stevens
REDMOND, STEVENS, LOFTIN & CURRIE
29 North Market Street
P. O. Box 7146
Asheville, North Carolina 28807

This 10th day of January, 1984.

/s/ Sydnor Thompson
SYDNOR THOMPSON

NORTH CAROLINA

MECKLENBURG COUNTY

Appendix 15

C. Richard Rayburn, who for a period of more than five years, has been a member of the Bar of the State of North Carolina and who has no interest in the subject matter of Chemical Realty Corporation v. Home Federal Savings and Loan Association of Hollywood, No. 8228 SC 1265, in the Court of Appeals of North Carolina, and who has not been of counsel for Chemical Realty Corporation or Home Federal Savings and Loan Association of Hollywood in the action on appeal, hereby certifies he has carefully examined the appeal and the authorities cited in the decision, and that he considers the decision of the Court of Appeals in error on the point of its not having ordered a new trial or, in the alternative, authorized the taking of further evidence as the Superior Court may deem necessary to enable it to make proper findings, as a matter of law.

This 9th day of January, 1984.

/s/ C. Richard Rayburn
Attorney at Law

C. Richard Rayburn
2100 First Union Plaza
Charlotte, North
Carolina 28282

NORTH CAROLINA

MECKLENBURG COUNTY

Appendix 16

S. Dean Hamrick, who for a period a more than five years, has been a member of the bar of the State of North Carolina and who has no interest in the subject matter of Chemical Realty Corporation v. Home Federal Savings and Loan Association of Hollywood, No. 8228 SC 1265, in the Court of Appeals of North Carolina, and who has not been of counsel for Chemical Realty Corporation or Home Federal Savings and Loan Association of Hollywood in the action on appeal, hereby certifies he has carefully examined the appeal and the authorities cited in the decision, and that he considers the decision of the Court of Appeals in error on the point of its not having ordered a new trial or, in the alternative, authorized the taking of further evidence as the Superior Court may deem necessary to enable it to make proper findings, as a matter of alw.

This 10th day of January, 1984.

/s/ S. Dean Hamrick
Attorney at Law

S. Dean Hamrick, Esq.
1014 Law Building
Charlotte, North
Carolina 28202

Appendix 17

No. 8228-SC-1265 Twenty-Eighth District

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * * * * *

CHEMICAL REALTY CORPORATION	)	FROM BUNCOMBE COUNTY
	)	No. 76-CVS-2491
v.	)	
	)	
HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD	)	

* * * * * * * * * * * * * * * * * * *

PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. §7A-31

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA

Chemical Realty Corporation, plaintiff-appellant, ("Chemical") respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the North Carolina Court of Appeals filed December 6, 1983, certi-

fication date December 27, 1983, in No. 8228SC1265, a copy of which is attached hereto, for the following reasons:

(1) The decision of the Court of Appeals, remanding the case to the trial court on the existing record, appears likely to be in conflict with North Carolina law as set forth in Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983), in which the Supreme Court ordered a new hearing for the trial court to make sufficient findings of fact and conclusions of law in a non-jury case.

(2) The subject matter of the appeal has significant public interest.

(3) The case involves legal principles of major significance to the jurisprudence of the State of North Carolina.

Appendix 19

In support of this petition, Chemical shows the following:

FACTS

Chemical filed this action in the Buncombe County Superior Court on December 20, 1976 and seeks to recover $5,694,951.56 in money damages for, inter alia, the defendant's breach of a permanent loan commitment for the Landmark Hotel (now Inn on the Plaza) in Asheville, North Carolina. This case was tried before the Honorable C. Walter Allen, sitting without a jury, in Buncombe County Superior Court from September 22, 1980 through and including October 9, 1980. Closing arguments in the case were deferred pending the preparation of the trial transcript by the court reporter. Pursuant to Judge Allen's instructions, both parties

filed proposed findings of fact, conclusions of law and judgment on November 2, 1981, and Home Federal was allowed to file a substitute proposed judgment on November 17, 1981. Judge Allen heard closing arguments in the case on November 23, 1981. Pursuant to Rule 52 of the North Carolina Rules of Civil Procedure, Judge Allen made certain findings of fact and conclusions of law and entered judgment for the defendant on June 29, 1982, and Chemical gave notice of appeal on July 7, 1982. On December 3, 1982 the Record on Appeal in this case was docketed with the North Carolina Court of Appeals.

On December 6, 1983, the Court of Appeals filed its decision in this matter, and the case was certified to Buncombe County on December 27, 1983.

The Court of Appeals reversed the judgment of the trial court, and remanded the case to the trial court on the existing record "for further proceedings consistent with this opinion" on the ground that the trial court failed to make certain essential findings of fact and conclusions of law. Slip op. at 13.

On January 11, 1984, Chemical filed a petition under Appellate Rule 31 for rehearing of the judgment of the Court of Appeals, seeking to obtain a new trial. By order entered February 7, 1984, the Court of Appeals denied Chemical's petition for rehearing and certified the order to the Clerk of Superior Court in Buncombe County, North Carolina. Chemical petitions the Supreme Court for discretionary review

under N.C.G.S. §7A-31 and Rule 15 of the North Carolina Rules of Appellate Procedure.

REASONS WHY CERTIFICATION SHOULD ISSUE

I.

The Court of Appeals has reversed the judgment of the trial court and ruled that the case can be remanded to the trial court "on the existing record" without the necessity of a new trial. Slip op. at 13. Chemical does not contest that part of the appellate court's opinion which reverses the judgment of the trial court. However, the ruling of the Court of Appeals remanding the case on the existing record without a new trial is contrary to the holding of the North Carolina Supreme Court in Farmers Bank v. Michael T. Brown Distributors, Inc., 307 N.C. 342, 298 S.E.2d 357 (1983).

In Farmers Bank, as in this action, the case was tried without a jury. In both cases the trial courts made certain findings of fact and conclusions of law on some of the issues in the cases but failed to make necessary findings arising under the pleadings and the evidence. The Supreme Court in Farmers Bank vacated the order of the trial court and ordered a new hearing so that the court could make adequate and appropriate findings of fact and conclusions of law. The Supreme Court noted that there was a conflict in the evidence as to the intention of the parties concerning the terms of a guaranty agreement. Thus, a question of fact existed for the court, as the trier of fact, to decide. However, the court failed to make any findings as to

the intent of the parties. The Supreme Court stated:

> We hold, therefore, that the findings of fact in the trial court's order are insufficient, for the reasons discussed in this opinion, to support the conclusions of law made. For the trial court to fully comply with the principles discussed in this opinion, its order must be vacated and a new hearing held so that it can make adequate and appropriate findings of fact and conclusions of law. (Emphasis added.)

307 N.C. at 353. The majority rejected the suggestion of the dissent that the case "be remanded for additional findings of fact." Id., at 356.

It is the contention of Chemical that the Court of Appeals should have ordered a new trial in this case as the Court did in the Farmers Bank case. As in Farmers Bank, the trial court failed, among other things, to make any findings of fact as to the intentions of Chemical,

Home Federal, Landmark or others with respect to significant issues, such as the management contract for the hotel. The decision of the Court of Appeals clearly conflicts with the majority decision in Farmers Bank.

There are other North Carolina decisions which also support Chemical's argument for a new trial. See O'Grady v. First Union National Bank, 296 N.C. 212, 250 S.E.2d 587 (1978); Baysdon v. Nationwide Mutual Fire Insurance Co., 259 N.C. 181, 130 S.E.2d 311 (1963); Conrad v. Jones, 31 N.C.App. 75, 228 S.E.2d 618 (1976).

The instant case is analogous to the Conrad case in which the plaintiffs sought a mandatory injunction ordering the defendants to disconnect a sewer line constructed by them from an eight

inch line allegedly owned by one of the plaintiffs and a permanent injunction restraining the defendants from reconnecting their sewer line to the plaintiff's sewer line. The action was tried without a jury, and the court made findings of fact and concluded that the plaintiffs were not entitled to equitable relief. On appeal by the plaintiffs, the Court of Appeals reversed the trial court, vacated the judgment and ordered a new trial because the trial court failed to make any findings with respect to what interest, if any, the plaintiffs had in the sewer line, and thus whether they were entitled to equitable relief. 31 N.C.App. at 79. As in Conrad, until the trial court determines the fundamental question of whether a contract

exists between Chemical and Home Federal, the court cannot determine the other issues in the case which it has already determined. Since the new judgment may be tainted by the old judgment, Chemical is entitled to a new trial.

Chemical's position that a new trial should have been granted is strengthened further by Chemical's exceptions, assignments of error and arguments made in its appellate brief relating to the erroneous introduction of certain trial testimony. The Court of Appeals erroneously states in its decision that "we perceive there are no questions raised in the appeal as to the admission of evidence or credibility of witnesses ...." Slip op. at 13. Chemical did raise these issues on

appeal, but the Court of Appeals apparently overlooked them. As explained in Part VI of Chemical's brief filed with the Court of Appeals on February 1, 1983, the trial court erred by allowing various lay witnesses to testify as to the existence and legal effect of various contracts involved in the lawsuit. However, North Carolina law is clear that "a witness will not be allowed to give his opinion on the very question for the jury to decide" and "a non-expert may not testify to the legal effect of a transaction or other fact." See H. Brandis, Brandis on North Carolina Evidence, §126 at 393; §130 at 501 (2d Rev. Ed. of Stansbury's North Carolina Evidence); see also, The Bonnett-Brown Corporation v. Coble, 195 N.C. 491, 142 S.E. 772 (1928), and

Richard v. Wilmington and Weldom Railroad Company, 126 N.C. 100, 35 S.E. 235 (1900), in which the Supreme Court ordered new trials because the trial court erred in allowing non-expert opinion testimony.

It is not enough to say that the trial court should be deemed to have disregarded the inadmissible evidence. Since there was no admissible evidence on which the trial court could have reached the result contained in the judgment, it is clear that the inadmissible evidence did affect the decision.

Moreover, in O'Grady v. First Union National Bank, 296 N.C. 212, 250 S.E.2d 587 (1978), the court ordered a new trial where the court in a non-jury case erred in making rulings on the admission of certain testimony. Here

to a new trial should be ordered based on the trial court's erroneous evidentiary rulings.

In addition to the erroneous evidentiary rulings of the trial court, Chemical also made exceptions and assignments of error relating to errors of law in the findings and conclusions relating to the issue of a first lien on the hotel real property. For example, conclusion of Law Number 4 states in part:

> On October 14, 1974, neither Landmark nor Chemical could deliver a permanent loan Deed of Trust evidencing a valid first lien on the hotel real property to secure a $6,000,000.00 loan evidenced by the first mortgage real estate note.

As explained in Chemical's appellate brief in parts II-A-2, V-K and V-L-3, that conclusion is based on erroneous legal interpretations of the trial

court. Although the Court of Appeals did not reach that question, it goes to the heart of the case. In Rock v. Ballou, 286 N.C. 99, 209 S.E.2d (1974), while the North Carolina Supreme Court refused to order a "complete new trial", in a case where findings of fact were inadequate, it did so on the ground that "no error of law is shown in the findings of fact heretofore made." The errors of law in the present case pervade the judgment and should result in a new trial.

II.

If Chemical is not entitled to a new trial on all of the issues in the case, it is clearly entitled to an evidentiary hearing on the six issues which the Court of Appeals has stated must be resolved by the trial court.

See Slip op. at 12. In Quick v. Quick, 305 N.C. 446, 290 S.E.2d (1982), the plaintiff sought permanent alimony and attorney's fees. The trial-court, after hearing extensive testimony and receiving various documents into evidence, made findings of fact under Rule 52, but the Supreme Court found the court failed to make findings on certain material issues which would support the judgment for the plaintiff in the amount of $1275.00 per month as permanent alimony and $1000.00 in attorney's fees. The court stated:

> [T]here is evidence in the record from which findings of fact could be made to support the amount awarded. There is also ample evidence which would support a lower award. What the evidence does in fact show is a matter for the trial court's determination, and its determination should be stated in appropriate and adequate findings of fact.

305 N.C. at 457. The court held:

> For the reasons stated above, the decision of the Court of Appeals is reversed. The order awarding plaintiff permanent alimony and attorney's fees is vacated. A new hearing shall be held in the trial Court for determination of permanent alimony and counsel fees, if any, and the trial court shall make appropriate and sufficient fundings of fact and conclusions of law to support its new determination. (Emphasis added.)

Id., at 463.

In Rock v. Ballou, 286 N.C. 99, 105, 209 S.E.2d 476 (1974), a case in which the parties had waived jury trial and the Supreme Court of North Carolina remanded the case to the Superior Court for further fundings of fact, the Supreme Court said:

> "The matter must be remanded to the Superior Court solely for findings as to the above mentioned questions of fact, which findings the Superior Court may made upon the present record, together with

> such further evidence as the Superior Court may deem necessary to enable it to make such findings, and thereupon to enter its judgment." (Emphasis added)

The Superior Court should be given the same authority here.

The decision of the Court of Appeals is contrary to the law of North Carolina as enunciated by the Supreme Court. If the decision of the Court of Appeals is permitted to stand, it will be in direct conflict with the decisions of the North Carolina Supreme Court discussed herein.

In addition, the subject matter of this appeal has significant public interest and involves legal principles of major significance to the jurisprudence of the State of North Carolina in that it involves the breach of a take-out agreement by a permanent lender to

a construction lender for commericial real estate. As far as Chemical has been able to determine, this case presents issues which have not been decided by the courts in North Carolina and which are very important in commercial lending.

WHEREFORE, for the reasons set forth above, Chemical respectfully requests that the North Carolina Supreme Court issue an order certifying this cause for review.

Respectfully submitted this 21st day of February, 1984.

/s/ Sydnor Thompson
Sydnor Thompson

/s/ Sally Nan Barber
Sally Nan Barber

ATTORNEYS FOR CHEMICAL REALTY CORPORATION

OF COUNSEL:

Appendix 36

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APPENDIX

LIST OF PARENT CORPORATION, AFFILIATED CORPORATIONS AND SUBSIDIARY CORPORATIONS PURSUANT TO RULE 28.1

Home Federal Savings and Loan Association of Hollywood changed its name to Home Savings Association of Florida and converted from a federally chartered to a state chartered savings and loan association on June 2, 1980.

Parent Corporation: None

Affiliated Corporations: None

Wholly Owned Subsidiary Corporation:

American Home Service Corporation

CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Respondent's Brief in Opposition to Petition for Writ of Certiorari to the North Carolina Court of Appeals by depositing same in a United States mail box with First-Class postage prepaid and addressed to the following attorneys for Petitioner:

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This 1st day of August, 1984.

John E. Raper, Jr.
JOHN E. RAPER, JR.